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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RODNEY JAMES ALCALA,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Real Party in Interest.

G042393

(Super. Ct. No. C42861)

O P I N I O N

Original proceedings; petition for a writ of prohibition/mandate to challenge an order of the Superior Court of Orange County, Francisco P. Briseño, Judge. Petition granted.

Richard Schwartzberg and George Peters for Petitioner.

No appearance for Respondent.

Tony Rackauckas, District Attorney (Orange County), James J. Mulgrew, Deputy District Attorney, Steve Cooley, District Attorney (Los Angeles), Gina T. Satriano, Deputy District Attorney, for Real Party in Interest.

Petitioner Rodney James Alcala contends he was denied his constitutional right to represent himself when the trial court denied his motion under the United States Supreme Court decision in *Faretta v. California* (1975) 422 U.S. 806. The Orange County and Los Angeles County District Attorney Offices were invited to file an informal response to the petition for a writ of prohibition/mandate and the Orange County District Attorney advises this court that based on Alcala's reaffirmation of the *Faretta* waivers and his representation that he would not seek a continuance, the petition should be granted. We agree and the petition is granted.

FACTS

Petitioner Rodney James Alcala is charged in a capital case with five counts of murder. Alcala's original conviction and death sentence for the murder of victim Robin Samsøe in Orange County in 1979 were reversed by the Supreme Court in *People v. Alcala* (1984) 36 Cal.3d 604. Alcala's second conviction and death sentence were affirmed by the Supreme Court in *People v. Alcala* (1992) 4 Cal.4th 742, but reversed in a petition for a writ of habeas corpus by the Ninth Circuit Court of Appeals in *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862. Alcala's third trial for the murder of Robin Samsøe is scheduled to begin September 28, 2009. As a result of the Supreme Court's decision in *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, the Samsøe prosecution has been joined with four counts of murder alleged to have occurred in Los Angeles County in 1977, 1978, and 1979.

On May 29, 2009¹, approximately four months before the commencement of trial, Alcala asked the trial court to discharge trial counsel so that he could represent himself. At the closed in camera proceeding, the trial court explained that "as time has gone on from the time I made my last ruling on this subject, is I'm more comfortable with

¹ Although the trial court and counsel refer to the May 29 *Faretta* motion, according to Alcala's declaration filed June 22, 2009, his written request to represent himself was filed in the trial court on April 17, but was not heard by the trial court until May 29, 2009.

that ruling. Nothing has changed my view that [counsel] should remain as your attorney.” The court continued, “You know, this discussion about whether you should or should not act as your own attorney has been an ongoing discussion since the very first time we met. My initial impression when you raised the issue was, you should act as your own attorney, I think that’s what I told you, and that was where [previous counsel] was your attorney, and I wasn’t making a difference between [previous counsel and current counsel], it’s just that you are so bright, you are very articulate, and you know the factual record better than any human being on this planet. You have lived with this case for over 20 years. You personally feel that you should have never been charged with these offenses, let alone ever convicted. You personally see the case as a very weak one on the part of law enforcement.”

The trial court explained that in reaching its decision, it considered Alcala’s request filed April 17, 2009, in which Alcala made reference to being forced into a Hobson’s choice, in his “renewed request to relieve [counsel] and [] renewed request to act as [his] own attorney.”

When given the opportunity to address the court on May 29, Alcala said, “[t]he only thing that I want to say is that, is that I first asked for replacing counsel, and that is, obviously you denied that. Then I asked for pro se status on the Samscoe case and new counsel on the L.A. cases, and you denied that. And the only thing left then is pro se or pro per on both cases. [¶] The only thing I want to add is that I think that the second one where I think that I have both a constitutional right to be pro se on Samscoe case and a right to be – to have counsel on the L.A. cases, and I don’t think they are mutually exclusive. This is just from my observation. [¶] I know there are cases where you can’t break – you can’t say okay, I want to represent myself on this case, but not on this case, right. But the history of the Samscoe case and the history of the L.A. cases are so far apart that I feel that I should have that right, and I just wanted to make a record saying that that’s my humble opinion is that I should be able to represent myself on one and have

counsel on the other. [¶] I understand the court is denying that also, but I just wanted to make sure that record that – so I understand that if I go pro se, it’s for both Samsøe and the L.A. cases.”

After the trial court denied his “renewed request,” Alcalá filed a written “Faretta Waiver” with the trial court four days later on June 3, in an effort to represent himself at trial. The waiver, which is essentially a questionnaire, provides warnings to Alcalá about the dangers of self representation. Alcalá placed his initials in multiple locations, signed, and dated the *Faretta* Waiver acknowledging that (1) it is “almost always unwise to represent yourself,” (2) he is not entitled to any special privileges or treatment from the judge and he is required to follow all the technical rules of law, (3) he understands the prosecutor will be an experienced, professional attorney and it will not likely be a fair contest because the prosecutors will have an advantage because of their skill and experience, (4) because he is in custody, he will not receive additional library privileges, extra time for preparation, or convenient access to staff or investigators, (5) he forgoes an ineffective assistance of counsel claim that could result in a new trial with competent counsel, (6) if he changes his mind about representing himself during trial, he may not be permitted to continue the trial to obtain an attorney, and (7) his right to represent himself may be terminated and an attorney may be appointed for disruptive behavior.

According to the information Alcalá provided on the waiver, he knows that he is charged with five counts of murder, he is aware of the maximum penalty if convicted, he has five years of college, he at one time represented himself on a speeding ticket in 1968, he had no difficulty reading the *Faretta* Waiver, and he explained that the reason he wants to represent himself is because his current appointed attorneys have acted more incompetently than his previous attorney, and if they continue to represent him on the Samsøe case, their incompetence “would almost certainly result in an unjust conviction, like [the] 2 prior convictions on the Samsøe case.”

When Alcala appeared in court on June 3, the court again described Alcala as “bright” and “articulate,” and stated that he demonstrated an understanding in criminal procedure better than most pro pers. The trial court described three prior instances when Alcala stated he wanted to represent himself and then withdrew his requests. The trial court stated that it was “more convinced [and] more satisfied that it would be improper to grant [Alcala’s] request to act as [his] own attorney,” and explained that it did not consider Alcala’s request to be a “distinct unambiguous offer” to represent himself. According to the court, Alcala’s requests have always been “qualified” and described as being “forced into a Hobson’s choice.”

On June 9, the parties returned to court to make a record for possible pretrial writ review. At this time the trial court said, “I think I was quite clear on Wednesday, [June 3] the basis of the court’s ruling, for that period of time, which is of substantial duration, that Mr. Alcala’s request, even as recently submitted on the 29th, and also on the 3rd, is too equivocal, and if you look closely at the exhibit, court exhibit 94, [the request filed by Alcala on April 17] it’s conditional, and if you look at the entire record, you will see that he has expressly stated that he does not feel that he’s qualified to act as his own attorney, and he broke it into two compartments, one, he feels comfortable with his understanding of the circumstances surrounding the allegation of the [Samsoe] homicide, but he is not qualified to handle the complexities of criminal procedure or how fluid criminal trials are. This last statement has been made on several occasions.”

Based on the trial court’s explanation for denying the motion, trial counsel filed a brief in support of Alcala’s *Faretta* motion arguing that on May 29 and June 3, Alcala made a timely unequivocal request to represent himself at trial and his request to represent himself should have been granted. In addition to counsel’s brief, Alcala filed a declaration under penalty of perjury in which he took issue with the portion of the court’s ruling that was based on his statement that he did not believe he was qualified to handle complex legal procedural matters as a reason to deny his *Faretta* motion. Alcala

complained that a defendant's legal knowledge of the law is an improper factor to assess whether a defendant is competent to waive his Sixth Amendment right to counsel and represent himself at trial.

During counsel's voir dire of Alcala on June 22, counsel stated, "Just so it's clear, your honor, today Mr. Alcala is prepared to make an unequivocal request to go pro per without condition and is prepared to tell the court that he will be ready to try the case on the presently scheduled trial date of September 28th, 2009. It's our position that once he says that, the court has no authority to deny him self-representation."

The trial court replied, "Today you have said that Mr. Alcala is prepared to make that statement, but that's not my recollection as to what took place on the 29th or on the – the 29th of May or the 3rd of June." Before ruling on the motion, the trial court explained, "From the very beginning Mr. Alcala indicated that he wanted to act as his own attorney, and I don't recall whether we actually did the *Faretta* part, but I did tell Mr. Alcala I thought it was a good idea, this is when [prior counsel] was acting as his attorney, because the law supports that, and he's very bright, he's very articulate, and at that time it was just the [Samsoe] case before me, and I thought no one could grasp the facts better than he could. There wasn't any intent to lead him on or not. I basically told him what I just summarized. He withdrew his request to act as his own counsel. [¶] Later on [,] the subject matter came up about other matters, but it returned to should he act as his own attorney, and he qualified that by saying I can handle the facts, but I can't handle the criminal procedure. He has stated that a multiple number of times, both with [prior counsel] and his current attorney. [¶] The other condition was, he could act as his own attorney on the [Samsoe] case, but could not do the DNA type cases coming from Los Angeles. So I treated that as a conditional request."

Concerned about whether the trial court could consider facts in the record² prior to Alcala's current *Faretta* motion as a basis for its ruling on the motion, the proceeding was continued to give the deputy district attorney the opportunity to weigh-in with his opinion. On July 2, during voir dire with counsel, Alcala testified that it was his desire to represent himself at trial when he was before the court in May. Alcala acknowledged that if the trial court granted his *Faretta* motion he would not receive any consideration or benefits and his pro per status would not have any impact on his housing at the jail or materials and computers provided in the jail to assist in his defense. Alcala also acknowledged that even though he would have the right to financial assistance to hire experts and investigators, he would be responsible for locating and retaining investigators and experts. Most importantly, Alcala testified that he would be ready to proceed to trial on the current trial date of September 28, 2009. Alcala also testified that he was not attaching any conditions to the court granting the *Faretta* motion including money, exhibits, copies, equipment, or jail orders. When counsel explained that the trial court was concerned that his *Faretta* motion was an attempt to manipulate the system, Alcala added, "So I'm saying categorically now that I will not rescind my request to be pro per. In other words, it would put me back in the same position I am in, and that would be stupid."

The trial court made reference to Alcala's representation that he would be ready for trial on September 28, and its belief that Alcala's representation was inconsistent with his claim that he needed access to a computer for at least a year before he could be ready for trial. After reconsidering Alcala's *Faretta* motion, the trial court

² The record in this case consists of the petition, the exhibits in support of the petition, the informal response to the petition filed by real party in interest, and redacted versions of the reporter's transcripts of the proceedings conducted on October 23, 2003, January 26, 2004, February 2, 7, 8, 2007, March 28, 2008, May 19, 2008, August 8, 18, 21, 2008, November 4, 5, 6, January 5, 16, 2009, May 29, 2009, June 3, 9, 22, 2009, and July 2, 24, 2009.

once again denied the motion and stated that it found Alcala's "prior statements to be more credible than what he submitted on the 3rd of June or what he is submitting on the 2nd of July or what he's submitting today."

DISCUSSION

A criminal defendant has a Sixth Amendment right to the assistance of counsel at all critical stages of a criminal prosecution. (*United States v. Wade* (1967) 388 U.S. 218, 223-227; *Gideon v. Wainwright* (1963) 372 U.S. 335, 339-345.) The right to the assistance of counsel may be waived by a defendant who elects to represent himself. (*Faretta v. California* (1975) 422 U.S. 806, 807, 834-835; *People v. Marshall* (1997) 15 Cal.4th 1, 20; *People v. Clark* (1990) 50 Cal.3d 583, 617 (applies in capital cases).) When the defendant's mental competency is not an issue³ "[t]he right of self-representation is absolute," (*People v. Doolin* (2009) 45 Cal.4th 390, 453) provided the request is unequivocal, and knowingly, intelligently, and voluntarily made and asserted in a reasonable time before trial begins. "Otherwise, requests for self-representation are addressed to the trial court's sound discretion." (*Ibid.*)

When requested, "[a] trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial. [Citations.] (*People v. Welch* (1999) 20 Cal.4th 701, 729.)

With respect to the first condition, the Supreme Court in *Godinez v. Moran* (1993) 509 U.S. 389, explained, "'The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings.

³ (See *Indiana v. Edwards* (2008) 554 U.S. ___, [128 S.Ct. 2379.]

[Citation.] The purpose of the ‘knowing and voluntary’ inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced. See *Faretta v. California*, . . . (defendant waiving counsel must be “made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open’) [Citation.]” (*People v. Welch*, *supra*, 20 Cal.4th at pp. 733-734, original italics.)

Based on the record in this case, there are no facts that Alcala is not competent to waive his right to counsel and represent himself. In fact, to the contrary, the trial court’s description of Alcala as bright, articulate, and very knowledgeable regarding the facts of the Samsone case support a finding that Alcala has the mental capacity to waive his right to counsel and the ability to understand the charges and proceedings.

The trial court’s references to Alcala’s statements that he did not feel qualified to represent himself or handle complex criminal procedure are irrelevant to the court’s determination of whether a defendant is competent to waive his right to counsel and represent himself. “[T]he defendant’s ‘technical legal knowledge’ is ‘not relevant’ to the determination whether he is competent to waive his right to counsel, [Citation] and we emphasized that although the defendant ‘may conduct his own defense ultimately to his own detriment, his choice must be honored.’ [Citation.] Thus, while ‘[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts,’ [Citation] a criminal defendant’s ability to represent himself has no bearing upon his competence to *choose* self-representation.” (*Godinez v. Moran*, *supra*, 509 U.S. at p. 400.)

The record in this case also supports a finding that Alcala’s quest for self representation was a knowing, intelligent, and voluntary waiver of his right to counsel. “[A] reviewing court independently examines the entire record to determine whether the

defendant knowingly and intelligently invoked his right to self-representation.”

[Citation.] (*People v. Doolin, supra*, 45 Cal.4th at p. 453.)

On June 3, Alcala filed a written motion and “Faretta Waiver” with the trial court. Alcala initialed, signed, and filed the *Faretta* Waiver acknowledging the dangers and disadvantages of self representation. In addition to the *Faretta* Waiver, Alcala’s written “motion for self representation” also filed by Alcala on June 3, states the trial court reviewed the danger and disadvantages of self representation listed on the *Faretta* waiver and he is “fully cognizant of them.”

In addition to the written warnings, the dialogue between Alcala, the court, and counsel on July 2 and 24, also support a finding that Alcala’s *Faretta* request was a knowing, intelligent, and voluntary decision after having been apprised of the dangers of self-representation. During the proceedings, Alcala acknowledged that he understood that he was charged with five counts of murder with special circumstances in a capital case and the maximum penalty if convicted. When counsel questioned Alcala on voir dire, Alcala acknowledged that if the court granted his *Faretta* motion he would not receive any considerations or benefits and his pro per status would not have any impact on his housing at the jail or provide greater access to computers or other materials at the jail. Alcala also acknowledged that even though he would have the right to financial assistance to hire experts and investigators, he would be responsible for locating and retaining investigators and experts himself. Alcala was also advised that as a consequence of self representation he would not receive the benefit of professional courtesies with the district attorney’s office and at the proceeding conducted on June 9, a deputy district attorney threatened that if Alcala’s *Faretta* motion was granted, the professional courtesies that had been extended to trial counsel, “above what is required of any prosecutor,” would not be extended to Alcala. To further enlighten Alcala to the dangers and disadvantages of self representation, the deputy district attorney explained that between the two DA’s trying the case, they had “about 30 years of experience in

cases like this” Alcala was also advised that by representing himself, he would forgo any claim of ineffective assistance of counsel on appeal and habeas corpus proceedings in state and federal courts as a result of his own representation.

The court and counsel also questioned Alcala on July 24, and he assured the court that he was in no way coerced into his decision to represent himself. Alcala also explained that the reference to the Hobson’s choice was because after the trial court denied his other alternative remedies for new counsel or co-counsel status, the only opportunity to properly represent himself was to represent himself on all counts.

Based on Alcala’s motion on June 3, the proceeding on June 9, the trial court’s reconsideration of the motion on June 22, and subsequent proceedings on July 2 and 24, the record supports a finding that Alcala was aware of the danger and disadvantages of self representation to establish a knowing, intelligent, and voluntary waiver of his right to the assistance of counsel and request to represent himself.

With respect to the second condition that a defendant’s *Faretta* request must be unequivocal, the trial court in this case took into consideration the “entire record” of Alcala’s *Faretta* requests dating back six years to 2003. The trial court recounted the facts of at least three requests Alcala made to represent himself from October 2003, December 2008, and January 2009. The trial court explained how Alcala’s requests were either conditional, immediately withdrawn, or described that he was being denied his constitutional right to counsel in the Los Angeles case by requiring him to accept counsel on all counts or representing himself on all counts.

When considering Alcala’s request filed April 17 and heard on May 29, the trial court considered the request equivocal based on Alcala’s claim that he was being forced into a Hobson’s choice of representing himself. However, when given the opportunity to address the court on May 29, Alcala clarified that he wanted to make a record that even though he believed that he was legally entitled to represent himself on the Samsone case and entitled to counsel on the L.A. cases, he understood that his pro per

status meant representing himself on the Orange County and the Los Angeles County cases for five counts of murder and said, “. . . I understand that if I go pro se, it’s for both Samsoe and the L.A. cases.”

Although Alcala had made it clear to the court on May 29, June 3, June 22, July 2 and July 24, that he understood that self representation included all five murder counts, the trial court continued to categorize Alcala’s *Faretta* motion as ambiguous when it stated, “Alcala’s request, even as recently submitted on the 29th, and also on the 3rd, is too equivocal” However, when Alcala had an opportunity to address the court on July 2, he admitted that his prior *Faretta* requests were conditional, but stated there were no conditions attached to his current request to represent himself and he understood that self representation included all five homicide counts. And when questioned by counsel on July 24, Alcala reiterated that his request was “unequivocal” and made “without conditions.”

Based on this record we find no support in the trial court’s finding that Alcala’s *Faretta* motion filed in court June 3 and reconsidered by the court on June 22, could be interpreted as equivocal in order to deny Alcala his right to represent himself at trial.

In denying the motion, the trial court took the “totality of the facts and circumstances” approach reaching back six years to determine whether Alcala’s current request was unequivocal. “[A] defendant has a federal constitutional, unconditional right of self-representation [and] in order to invoke that right, he or she must make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial. [Citations.]” (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.) Nothing in *Faretta* suggests the defendant’s motion to represent himself is based on an accumulation of evidence beyond the request, but instead limited to the issue of timeliness, a current assessment of the defendant’s competence to waive his right to counsel, and an unequivocal request for self representation.

However, when a defendant's *Faretta* motion is not made within a reasonable time prior to the commencement of trial or it is made in bad faith or in an attempt to manipulate, disrupt, or delay the orderly administration of justice, "self-representation no longer is a matter of right but is subject to the trial court's discretion." [Citation.]" (*People v. Jenkins, supra*, 22 Cal.4th at pg. 959.) When exercising this discretion, "the trial court should consider factors such as "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion."" [Citation.]" (*Ibid; People v. Windham* (1977) 19 Cal.3d 121, 128, (trial court exercises its discretion when the defendant makes an untimely *Faretta* motion); *People v. Gallego* (1990) 52 Cal.3d 115, 164 (trial court exercises its discretion when defendant attempts to manipulate proceedings).)

In this case, the trial court did not make a finding that Alcala's request was untimely. Nor did the trial court make a determination that Alcala's previous requests for self representation and the subsequent withdrawals of his requests were made in bad faith, or intended to disrupt, delay, or manipulate proceedings to his advantage to justify the exercise of the court's discretion and the use of facts beyond the current motion.

With respect to the last condition that the *Faretta* request must be made within a reasonable time before trial, in *Faretta*, the Supreme Court determined that the defendant's request made "weeks before trial" constituted a timely request in that case. But in *Faretta*, the defendant was charged with grand theft, and in this case, Alcala is charged in a capital case with five counts of murder and "weeks before trial" or even months before trial may not necessarily be reasonable.

Although Alcala's requests on April 17, May 29, and June 3, were made approximately four to five months before trial is scheduled to begin on September 28, 2009, the trial court was legitimately skeptical of Alcala's claim that he would be ready

to proceed based on his claim that he needed access to a computer for at least a year to be ready for trial. Nonetheless, the trial court never made a finding that Alcala's request was untimely and in response to the court's concern, Alcala and counsel explained that his statements about his computer needs were made in 2007 and 2008, and that access to a computer did not affect his ability to be ready for trial, only that it may slow down the presentation of evidence and take more time to present his case during trial because documents were not on a computer.

Consistent with its obligation under *Faretta*, the trial court warned Alcala about the danger of representing himself in a capital case. The record shows that Alcala is aware of the dangers and disadvantages of proceeding as a pro per defendant and has nonetheless decided to represent himself. Alcala's request was timely and unequivocal and the record does not support a finding denying his *Faretta* motion. For the forgoing reasons, the petition is granted.

DISPOSITION

Let a peremptory writ of mandate issue commanding the superior court to vacate its order denying petitioner's *Faretta* motion and enter a new and different order discharging appointed counsel and granting petitioner's *Faretta* motion. In the interest of justice, the opinion in this matter is deemed final as to this court forthwith.

SILLS, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.